

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACQUELINE ANDERSON)

Claimant)

VS.)

PIONEER BALLOON COMPANY)

Respondent)

AND)

LEGION INSURANCE COMPANY)

Insurance Carrier)

Docket No. 217,348

ORDER

Respondent appeals from an Award by Administrative Law Judge Nelsonna Potts Barnes dated April 27, 1999. The Appeals Board heard oral argument September 16, 1999.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared on behalf of claimant. Vincent A. Burnett of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant has, as a result of compensable bilateral carpal tunnel syndrome, 96.5 percent work disability. On appeal, respondent contends claimant has not proven she suffered accidental injury arising out of and in the course of her employment with respondent. Respondent further contends that if claimant does have a compensable injury, the injury is to her right upper extremity only. Claimant is not, according to respondent, entitled to a work disability and should be limited to an award for, at most, the functional impairment to her right upper extremity.

Respondent's application for review raised two additional issues not argued in its brief or at oral argument: (1) What was claimant's average weekly wage and (2) was claimant, as

the ALJ found, underpaid temporary total disability benefits? As to these issues, the Appeals Board agrees with and adopts as its own the findings and conclusions by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. Based on the findings of fact and conclusions of law stated below, the Board awards benefits for a 10 percent disability to claimant's right upper extremity.

Findings of Fact

1. Claimant began working for respondent as a balloon packager on August 19, 1996. The duties required repetitive hand motion to first weigh the balloons, place a portion in a container, then grasp balloons 150 to 200 at a time to fill bags, and finally to seal bags of balloons. The process, taking approximately ten seconds, was repeated through the work day.
2. After working for approximately one week, claimant's right hand became sore and stiff, sometimes feeling like it was falling asleep. She began dropping things and she notified her supervisor. Claimant had not had similar problems before working for respondent. Although at one point in the testimony claimant testified to the contrary, the Board finds claimant did not experience symptoms in her left upper extremity until sometime after she left work for respondent. Claimant also testified the symptoms on the left began after she wore a brace and sling on the right. The medical records show no complaints to the left until approximately two months after claimant last worked.
3. On August 31, 1996, after working 11 days for respondent, claimant's supervisor sent her to the emergency room at the Susan B. Allen Memorial Hospital in El Dorado. The records from the emergency room visit do not show complaints to the left upper extremity. She complained of swelling and numbness in the right hand with pain on the right extending up to the shoulder and had pain at the base of the neck on the right side. Claimant's right arm was placed in a sling. She was taken off work and told she should see Dr. Phillip S. Olsen.
4. Because Dr. Olsen was on vacation, claimant was seen first by Dr. Kyle M. Tipton and then by Dr. Olsen for a total of five visits in September 1996. Dr. Olsen's records reflect no complaints regarding claimant's left upper extremity. Dr. Olsen prescribed physical therapy, which did not provide relief, and then referred claimant to Dr. Harry A. Morris, a hand specialist. At the time Dr. Olsen referred claimant to Dr. Morris, Dr. Olsen thought claimant's problems were from overuse. When informed of the length of time claimant worked for respondent, Dr. Olsen concluded claimant did not work for respondent long enough for that work to be the cause of her hand problems. Dr. Olsen had done a preemployment physical before claimant went to work for respondent and noted no problems with claimant's upper extremities at that time.

5. On September 4, 1996, four days after she last worked for respondent, claimant tripped and fell. She went again to the emergency room at Susan B. Allen Memorial Hospital. The emergency room record shows she landed on her right elbow and left palm. The next day she began having shoulder and neck problems.

6. Dr. Morris first saw claimant October 23, 1996. Dr. Morris' records of the initial visit reflect no complaints relating to the left upper extremity. Dr. Morris considered some of claimant's symptoms to be suggestive of reflex sympathetic dystrophy. Dr. Morris gave claimant a release advising claimant not to use the splints or braces.

Dr. Morris saw claimant again on November 11, 1996. At this visit, claimant complained of problems on the left as well as the right. This was the first reference to symptoms on the left that Dr. Morris was aware of. Claimant informed him she had been having symptoms in her left upper extremity for two weeks.

Dr. Morris was unable to arrive at a specific diagnosis. He did not think the work for respondent was a factor in problems she was having, but he did think the fall could have been a factor. He believed that problems from the work would have resolved in the approximately two months from claimant's last work to the time she saw Dr. Morris. He gave no restrictions but did suggest she avoid work that involved repetitive activities. Dr. Morris thought there was a possibility claimant was displaying some emotional overlay causing symptom magnification.

Dr. Morris released claimant November 11, 1996.

7. After Dr. Morris released her, claimant went to Dr. R. M. Varner, her family physician. Dr. Varner referred claimant to Dr. Rizwan U. Hassan for a nerve conduction study. The nerve conduction study results were compatible with mild right carpal tunnel syndrome but were negative on the left. Dr. Varner then referred claimant to Dr. Tyrone D. Artz.

8. Claimant first saw Dr. Artz on May 12, 1997. Dr. Artz diagnosed, and eventually did surgery for, bilateral carpal tunnel syndrome. Dr. Artz also treated claimant for injury to the elbow resulting from the slip and fall. He did the surgery on the right elbow in June 1997. He did carpal tunnel surgery on the left in October 1997 and on the right in January 1998.

Dr. Artz rated claimant's impairment as 10 percent to each extremity and converted to 6 percent of the body for each extremity for a total of 12 percent impairment to the whole person.

Based on an FCE, Dr. Artz recommended claimant be limited to light work. Specifically, he recommended limiting lifting to 25 pounds one-third of the day and 15 pounds or less two-thirds of the day. He also recommended limiting repetitive activities such as gripping, pushing, and pulling to one-third of the day.

Dr. Artz did not believe the carpal tunnel syndrome was related to claimant's slip and fall. It was his impression that the carpal tunnel condition was at least aggravated by the work claimant did for respondent. But he also testified he could not state to a reasonable degree of medical probability what was the causative factor in claimant's left upper extremity problem. Dr. Artz agreed claimant had some degree of preexisting impairment but could not say how much.

Dr. Artz stated he would not recommend restrictions for claimant's elbow condition alone.

9. On December 6, 1998, at the request of claimant's counsel, claimant was examined and her injuries evaluated by Dr. Jane K. Drazek. Based on examination of claimant and review of claimant's medical records, Dr. Drazek opined that claimant's bilateral carpal tunnel syndrome was aggravated by work claimant did for respondent. Dr. Drazek assigned 10 percent for each extremity for a total of 12 percent to the whole person. Dr. Drazek also adopted, as Dr. Artz had, the restrictions from the FCE.

10. At the request of respondent's counsel, claimant was examined and her injuries evaluated by Dr. Frederick R. Smith. Dr. Smith saw claimant April 7, 1998. He reevaluated claimant June 23, 1998. Dr. Smith rated the impairment to the right upper extremity as 10 percent of the extremity or 6 percent of the whole person. He concluded claimant did not have carpal tunnel syndrome on the left and even after surgery had no impairment on the left side.

11. The Board finds claimant has not proven she has permanent disability to the left upper extremity arising out of and in the course of her employment for respondent. This conclusion is based on the fact the medical records show no left upper extremity complaints until November 1996, several months after claimant left work for respondent, the fact claimant's nerve conduction results were never positive on the left, and is based, in part, on the opinions of Dr. Olsen, Dr. Morris, and Dr. Smith.

Conclusions of Law

12. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

13. To be compensable under the Kansas Workers Compensation Act, the injury must arise out of employment. K.S.A. 44-501.

14. The Board finds claimant has met her burden of proving permanent disability to the right upper extremity arising out of and in the course of her employment but has not proven she had permanent impairment to her left upper extremity or neck arising out of and in the course of her employment.

15. The Board finds claimant has, and is entitled to benefits for, a 10 percent permanent partial disability to the right upper extremity. This conclusion is based on the ratings by Dr. Drazek, Dr. Artz, and Dr. Smith, who all rated the impairment to the right upper extremity as 10 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on April 27, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jacqueline Anderson, and against the respondent, Pioneer Balloon Company, and its insurance carrier, Legion Insurance Company, for an accidental injury which occurred August 31, 1996, and based upon an average weekly wage of \$286, for 62.34 weeks of temporary total disability compensation at the rate of \$190.68 per week or \$11,886.99, followed by 14.77 weeks at the rate of \$190.68 per week, or \$2,816.34, for a 10% disability to the right upper extremity, making a total award of \$14,703.33, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Paul V. Dugan, Jr., Wichita, KS
- Vincent A. Burnett, Wichita, KS
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director